In The
Supreme Court of the United States

October Term, 1927.

No. 343.

CLAUDE L. HEMPHILL,

Plaintiff in Error,

v.

JULIA STOTT ORLOFF,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

251557

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STATEMENT OF FACTS.

(Figures in parentheses refer to pages of the printed record, except as the context clearly indicates otherwise.)

Plaintiff in error's "Abstract of the Case" (pages 1-2 of brief of plaintiff in error) is extremely erroneous and misleading.

The payee of the note in suit was not "*the Trustees*" but the "Commercial Investment Trust," Exhibit 1 (86).

Plaintiff in error states that the Supreme Court of Michigan based its decision upon the ground that the

trustees were incapable of making a valid contract in Michigan without first complying with the Foreign Corporation Law. The Michigan Supreme Court held only that the business association called Commercial Investment Trust as such was amenable to the regulations imposed by Michigan statutes on corporations and such associations; it did not hold the trustees as such so amenable (197). The distinction is significant.

The statement that the trustees and creators and all parties interested in the Commercial Investment Trust were all citizens and individuals of states other than the state of Michigan, is utterly without any support in the record. Nevertheless, and in utter disregard of this fundamental difficulty, plaintiff has advanced privileges and immunities argument based upon this unfounded assumption.

Plaintiff, at page 12 of his brief, makes a transparently futile attempt to overcome his jurisdictional difficulty by declaring that the Michigan Supreme Court's holding was necessarily predicated on *their* (the trustees') being nonresidents. But it is perfectly clear from the opinion that the Michigan Supreme Court's holding applied to the Commercial Investment Trust as such and not to the trustees thereof.

Plaintiff's statement of facts (commencing on page 3 of his brief) is seriously inadequate and misleading. By selecting certain facts or parts of facts and omitting others, and by stating as facts what are only plaintiff's inferences, plaintiff draws a different picture and points to a different conclusion, than is warranted by the facts if told in their entirety. It is therefore important not only to correct some specific inaccuracies in plaintiff's statement but to state many facts which are omitted.

Plaintiff states at the outset that the note in suit was given by defendant for the assignment of certain truck notes sold by the Orloff Company to the trust and the delivery to her of five of the six trucks covered by this paper (Plaintiff's Brief, page 3). It will soon appear that the record conclusively establishes that this alleged consideration was a pure fiction to disguise the true nature of the transaction, which was an agreement by defendant, by her note, to pay the Orloff Company's indebtedness to the trust. Plaintiff's statement is based on a purely formal interpretation. The same may be said of plaintiff's statements that the Commercial Investment Trust never rented an office in Michigan; that the trust never had any interest in the Mercantile Finance Corporation and that the latter company *rediscounted* paper purchased by it with the trust. The *essence* of the relationship between the Mercantile Finance Corporation and the Commercial Investment Trust, as opposed to its *form*, was one of agency (as will appear *infra*).

Plaintiff's statement (page 3 of his brief) that the Commercial Investment Trust never had a bank account in Michigan is based merely on Dean's statement that *he* never had any bank account in Michigan (65). Dean was employed by the trust while on his way to Detroit from Pittsburgh; tentative arrangements for his employment, which proved final, were made in New York City, where Dean went before proceeding to Detroit, evidently for the express purpose of making such arrangements (64). Plaintiff's statement (Brief, page 3) that Dean had no relationship whatever with the trust before coming to Detroit is therefore erroneous. Plaintiff's statement that Dean did not pass upon the credit of prospective automobile purchasers (Brief, page 4), while true, standing by itself, is misleading when considered in connection with the statement on the same page that

the trust passed upon such credit in New York. Dean testified positively (68) that the Commercial Investment Trust used local Michigan agencies, as it necessarily must have done, in checking the credit of Michigan purchasers of automobiles. When the Mercantile Finance Corporation took over Dean's duties, the trust did not, as plaintiff states at page 6 of his brief, make credit examinations in New York. At the most, the trust merely examined credit statements furnished it by the Mercantile Finance Corporation (23). But the information for those credit statements was gathered, and the statements were prepared, *in Michigan*, by the agents of the Commercial Investment Trust (10, 46, 80). Moreover, actual approval of credit was made by the Mercantile Finance Corporation and Dean *in Michigan* (46, 80).

Plaintiff also states at page 5 of his brief, that Dean, in but a single instance, acting under specific instructions, executed a chattel mortgage discharge in behalf of the trust. His reference to the record does not support the statement. In fact, Dean's testimony was that he had *general* instructions to execute such discharges "*when necessary*" (63).

Plaintiff's statements (Brief, pages 6, 7) that the only cases in which the Mercantile Finance Corporation and Mayer as its vice-president, made collections pursuant to orders from the trust, and the only two cases in which Mayer signed renewal chattel mortgage affidavits on behalf of the trust, were the Orloff Company transactions indicated in those portions of the record referred to by plaintiff. These assertions are totally unwarranted. Mayer's testimony shows no such limitation; but, on the contrary, collections were made "right along" by the Mercantile Finance Corporation in *all* cases of delay in

payment (14, 15, 18)—from makers of notes (14, 15), and from the dealers themselves (18). Renewal affidavits were filed in more than the two Orloff instances referred to by plaintiff, for Mayer, immediately after speaking of the execution and filing of a renewal affidavit, testified, "I did acts of.....with other mortgages too of the Orloff mortgages" (14). Referring to filing affidavits of renewal, Mayer testified, "Our office probably did it" (11).

The note upon which this action was brought, Exhibit 1 (86-90), was executed by the defendant in error, Julia Stott Orloff, a resident of Michigan, in Detroit, Michigan, and was there delivered to Melvin B. Mayer, an agent of the Commercial Investment Trust, the payee of the note (25, 29, 74) which indorsed it to plaintiff in error (90), its vice-president (21, 22, 122, 131). The indebtedness upon which this note was based was owing by the Leonard B. Orloff Company, a Michigan corporation, to the C. I. T.[1] by virtue of its guaranties of payment of six notes to the C. I. T., Exhibits 29-34 (122-131, 21-22, 27-28).

The amount of Exhibit 1 was the exact total of the amounts owing on these six notes, Exhibit 1 (86-89, 21-22). At the beginning of the negotiations leading up to the execution of the note in suit, the C. I. T. demanded payment of these six notes from the Leonard B. Orloff Company (57, 69-70). When it became apparent that the

[1]The Commercial Investment Trust designated itself in its business dealings as "C. I. T.," and called its operations "C. I. T. service," and its scheme of doing business "C. I. T. plan" (36, 131, 132, 133), and for the sake of brevity we shall refer to it often by its own designation.

Leonard B. Orloff Company could not comply with this demand, the C. I. T. directed its agents to obtain payment by the defendant of this corporation's debt (41, 57, 73). The agents of the C. I. T. threatened to put the Leonard B. Orloff Company into bankruptcy, and defendant's husband into jail, unless the defendant made a satisfactory arrangement with the C. I. T. for the payment of the indebtedness of the corporation to the C. I. T. (40-41, 57, 70, 74).

The entire record establishes overwhelmingly that the defendant executed the note for the purpose of paying the indebtedness of the Leonard B. Orloff Company. The device adopted by the C. I. T. in its attempt to give the transaction a different appearance is so transparent that the essential character of the transaction is fully revealed. The C. I. T. was attempting to evade the laws of this state relating to the contractual limitations of married women, and this effort is sure proof of the real nature of the transaction. Mr. Mayer, who was the only representative of the C. I. T. present at the final meeting when the note was executed by Mrs. Orloff and delivered to Mr. Mayer as agent of the C. I. T. (21, 74), testified that the entire transaction was a means of substituting the defendant's liability for the indebtedness of the Leonard B. Orloff Company (21-22, 29).

Exhibit 1 provided that the trucks, which were the alleged consideration for the note, should be delivered *to the Leonard B. Orloff Company*, Exhibit 1 (80). And they were in fact delivered to the Leonard B. Orloff Company, and not to the defendant (22, 41). As to the notes of the Orloff Company which it is claimed constituted part of the alleged consideration for Exhibit 1, there is some uncertain testimony by Mayer that he thinks he turned them over to defendant and immediately

took them back; while defendant testifies positively that she never received them, never had possession of them (74-75).

The Commercial Investment Trust, at the time of the execution of Exhibit 1 and for approximately two years prior thereto, was engaged in Michigan through its agents in that state, in the business of buying notes and chattel mortgages on automobiles sold in Michigan (16-17). The agents of the C. I. T. solicited business for the C. I. T. by personally visiting automobile dealers in various parts of Michigan, at which time they explained the C. I. T. plan of business, quoted rates, urged these dealers to sell to the C. I. T. the notes and mortgages which they received in payment for cars sold by them, and left with such dealers advertising matter and chattel mortgage and assignment forms and other printed matter issued by the C. I. T. relating to the business of purchasing automobile paper and securities (9, 10, 16-17, 61-62). It was the duty of the agents to work up trade and business in the state for the C. I. T. (16). Dean was to develop and build up the business of purchasing automobile paper (61-62). Beginning with sometime in January, 1920, and continuing through the time of the execution of Exhibit 1, the Mercantile Finance Corporation, a Michigan corporation, having its office at 528 Ford Building, Detroit, Michigan, was an agent of the C. I. T. in that state (8-33). Its vice president, Melvin B. Mayer, was active in carrying on the business of the C. I. T. and was himself directly and continuously an agent of the C. I. T. in Michigan and carried on its business in that state (16, 17).

Chattel mortgages which were purchased by the C. I. T. in Detroit from automobile dealers were recorded in the city clerk's office in Detroit by Mr. Dean, Mr. Mayer and

someone in the office of the Mercantile Finance Corporation (11, 63). The agents of the C. I. T. in Michigan executed all necessary discharges and affidavits of renewal of mortgages in that state, and these discharges and renewal affidavits were then immediately filed in the Detroit city clerk's office by these agents (11, 12-13, 14, 63, 65). The records of the city clerk showed that in 1920 the C. I. T. purchased 198 mortgages on Detroit automobiles which were recorded and assignments of which were recorded (33-35), Exhibit 17 (110-118). The C. I. T. plan and its business as operated in Michigan contemplated and necessarily involved solely the purchase of Michigan notes and the continuous ownership, preservation and enforcement by it of liens on property in Michigan securing those notes (12-18), Exhibit 5 (99-106), Exhibit 41 (141). The C. I. T. furnished printed forms to its agents in Michigan, which were called "Michigan chattel mortgage"; these contained forms of assignment to the C. I. T.; they contained a complete set of instructions under the heading "Michigan," including careful directions for recording the papers in the "city or town where property will be kept" (9), Exhibit 5 (102-103). The printing of these forms with special reference to Michigan legal requirements indicates that the C. I. T. contemplated the continuous, frequent purchases of such mortgages in Michigan and the ownership and enforcement of them in Michigan; that, in fact, was the sole business of the C. I. T. in Michigan, complete in all its elements in Michigan, and intended to be and actually isolated from any other business transacted by the C. I. T. elsewhere. The mortgage forms provided that in the event of any default, the holder of the mortgage could declare the whole amount due, take immediate possession, and foreclose the mortgage by sale, Exhibit 5 (101). The very essence of the C. I. T.'s business—purchase and ownership of liens in Michigan

on property in Michigan—involved and contemplated the foreclosure of these liens, taking possession of the property, dealing with it, selling it, handling it—all entirely in Michigan, and all as a part of the regular business routine.

The Michigan business of the C. I. T. was completely and exclusively handled by the agents of the C. I. T. residing in Michigan. Collections for the C. I. T. upon mortgages which were assigned to it and filed in Michigan, when the makers failed to meet their payments, were made by the agents of the C. I. T. in Michigan (9, 11, 13, 14, 15, 18), Exhibits 15 and 16 (109), Exhibit 26 (120). Mr. Mayer, the resident agent for the C. I. T., repossessed cars and trucks covered by chattel mortgages recorded in Michigan and could sell them without special authority; he had a wide latitude in the manner of handling such cases, and he was not required to get authority for the details in connection therewith (15, 16, 25, 28), Exhibit 14 (108). The instructions which the C. I. T. gave to dealers were, to make arrangements with Mayer, its resident Michigan agent, as to collections (16), Exhibit 14 (108). Mayer had instructions and authority himself to make settlements in cases of defaults in payments (21), and the matters of arrangements and payments were left solely to him (27). Mayer sent and signed the name Commercial Investment Trust to notices declaring the whole balance due because of default in payment of an instalment (12), Exhibit 11 (106-107). He also negotiated the transaction leading to the execution of Exhibit 1 (21).

When the Leonard B. Orloff Company had failed upon demand by the C. I. T.'s agent to pay the notes which it was obligated to pay by virtue of its guaranties of payment executed at the time of the discounting of these

notes with the C. I. T. (Exhibits 29-34), the Mercantile Finance Corporation and Mayer were instructed to look after the collections on these notes (21) and to work with the Orloff Company for the purpose of collecting the amounts due on these notes (13). From that time on Mr. Mayer carried on active and extensive negotiations with the Leonard B. Orloff Company and sometimes with the defendant, for the purpose of watching after the interests of the C. I. T. Mr. Hemphill, vice-president of the C. I. T., and Mr. Deitz, manager of the automobile division of the C. I. T., were sometimes present at these negotiations (23-26, 28, 29-31, 57-60, 69-76). At the final meeting when the note (Exhibit 1) was executed and delivered to Mr. Mayer, Mr. Mayer was the sole representative of the C. I. T. present (21, 74). The investigation of and passing upon the credit of purchasers of automobiles or trucks whose notes and mortgages were to be purchased by the C. I. T., was made by the Mercantile Finance Corporation and Mr. Mayer and Mr. Dean in handling the business of the C. I. T. as its agents in Michigan (10, 46). Approval of credits was given by Mayer by telephone within an hour after names were submitted to him (80). Accounts owing to the C. I. T. were paid to the Mercantile Finance Corporation at its office in Detroit (14) and checks for automobile paper purchased by the C. I. T. were delivered by Mayer and Dean to the dealers (37, 78). The Mercantile Finance Corporation was empowered to receipt for payments owing to the C. I. T., Exhibit 11 (107). Mr. Mayer, as agent of the C. I. T. and in its behalf threatened the Leonard B. Orloff Company with bankruptcy and Leonard B. Orloff with imprisonment, just as Mr. Hemphill did (40-41, 57, 70, 74). Dean, as agent of the C. I. T., straightened out difficulties with dealers in this state (62). The C. I. T. did business also in other cities in Michigan. This business was worked up by agents Dean and Mayer,

in the same manner as the business in Detroit (16-17, 61-62).

After the agents of the C. I. T. passed upon the credit of prospective purchasers, the chattel mortgages were assigned by the dealers directly to the C. I. T. (10, 77), on forms furnished by the C. I. T. (77).

It is important to note that the C. I. T. chattel mortgage form which was used in all cases, contained an assignment direct from the automobile dealer to the C. I. T., Exhibit 5 (102). It is thus perfectly clear that these mortgages were not purchased by the Mercantile Finance Corporation and then resold to the C. I. T.; but, on the contrary, the Mercantile Finance Corporation, as well as Mr. Mayer and Mr. Dean, were simply agents employed to purchase such mortgages for the C. I. T. in the conduct of its business in Michigan.

The guaranty of each contract assigned to the C. I. T. by Michigan dealers, was signed by each dealer in Michigan. The assignment of each chattel mortgage sold to the C. I. T. was executed by each dealer in Michigan (10). Mayer was agent of the C. I. T. to get such assignments (77). The C. I. T. instructed dealers that all transactions of any kind were to be taken up with its agents (37).

On page 37 of the record Mr. Orloff explains the manner in which the business with the C. I. T. was handled, through Mr. Dean, its agent. He first gave Mr. Dean a financial statement of the purchaser, and after the purchaser was approved by Mr. Dean, the transaction was closed by delivery of the papers to him, the papers in question being the C. I. T. form of note and mortgage (Exhibit 5). Mr. Handy, an automobile dealer who did business with the C. I. T. through Mr. Mayer, its agent,

stated that he would inform Mr. Mayer by telephone of the purchaser's statement and the proposition; then he would receive a reply back as to whether it was acceptable (77); the assignment of the mortgage to the C. I. T. was then made and delivered to Mayer (77). The C. I. T. checks were delivered to Mr. Handy in person by Mr. Mayer within two days and sometimes within twenty-four hours (77); the credit was passed upon by Mr. Mayer sometimes within an hour and confirmation was given by Mr. Mayer over the telephone (80).

Of defendant's defenses to the action on Exhibit 1, as set forth in the pleadings, the following were insisted upon at the trial:

1. The indebtedness set forth in Exhibit 1 was the indebtedness of the Leonard B. Orloff Company, a Michigan corporation; defendant received no consideration therefor whatsoever and said Exhibit 1 did not in any way relate to the sole and separate estate of said defendant; said Exhibit 1 was therefore void as to defendant because she was, under Michigan laws, under the disability of coverture at the time of its execution (3, 4, 80-81).

2. The C. I. T. was created and existed by virtue of a certain written instrument called a declaration of trust, Exhibit 89 (165-180), filed on the second day of April, 1915, in the office of the commissioner of corporations and taxation of the commonwealth of Massachusetts at the state house in the city of Boston in said commonwealth, in accordance with the provisions of Chapter 182, General Laws of said commonwealth of Massachusetts, and all acts in amendment thereof and in addition thereto (32, 33), and it had not complied with the requirements of the statutes of the state of Michigan regulating

the transaction of business within the state of Michigan by foreign corporations; said Exhibit 1 was therefore void and unenforceable under the terms of said statutes because executed while the C. I. T. was incapable of making a valid contract in Michigan (5, 80).

3. Exhibit 1 was executed while the C. I. T. was carrying on its business in the city of Detroit, Michigan, without having complied with the statutes of the state of Michigan regulating the carrying on of business under an assumed or fictitious name, or those requiring the filing of certificates of copartnership in the office of the county clerk of the county of the state where such business was then transacted; by reason of such failure Exhibit 1 was void and unenforceable (6).

The C. I. T. never complied with the Foreign Corporation Law of Michigan, or with the Assumed Name or Copartnership Certificate Statutes (75-76).

The trial court, by a directed verdict upon unqualified motions for a directed verdict by both sides (80, 81, 83), sustained the first and second defenses set forth above and directed a verdict for defendant (84-85). The judgment entered thereon was affirmed by the Supreme Court of the State of Michigan (184-199).

Hemphill v. Orloff, 238 Mich., 508.

In addition to the provisions of the Foreign Corporation Law, Sections 9063, 9068 and 9071, Compiled Laws of Michigan, 1915, quoted in brief of plaintiff, it is important to note the following provision of the Constitution of Michigan, which was quoted and relied upon by the Michigan Supreme Court:

"The term 'corporation' as used in this article shall be construed to include all associations and joint stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships. All corporations shall have the right to sue and be subject to be sued in all courts in like cases as natural persons."

Article XII, Sec. 2.

ARGUMENT.

FIRST.

The Writ of Error Should Be Dismissed On Jurisdictional Grounds.

I.

The plaintiff in error is in no position to raise the privileges and immunities provision of Section 2 of Article IV, and the provision in the Fourteenth Amendment as to privileges and immunities because he fails to bring himself within the firm rule that only those directly affected may raise these constitutional questions.

See:

Hatch v. Reardon, 204 U. S., 152, 160-161.
Williams v. Walsh, 222 U. S., 415, 423.
Collins v. Texas, 223 U. S., 288, 295.
Missouri, Kansas and Texas Railway Company of Texas v. Cade, 233 U. S., 642, 648.

Plaintiff's claims are based upon alleged claims and rights of the beneficiaries and trustees of the C. I. T., and throughout his brief plaintiff treats them as though it were established by the record that they are citizens of states other than Michigan. But a close examination of the record fails to reveal any showing of the citizenship

of those beneficiaries and trustees. As far as any information this court may glean from the record is concerned, they may be citizens of some foreign country, or even of Michigan. In either case they would certainly not be in the class intended to be protected by the privileges and immunities clauses.

Slaughter House cases, 16 Wall., 36, 77.
Bradwell v. The State, 16 Wall., 130.
McKane v. Durston, 153 U. S., 684, 687.
Estate of Johnson, 139 Cal., 532, 535.
In re Colbert's Estate, 44 Mont., 259.
12 C. J., 1109.

It is worth while noting that in *Williams v. Walsh, supra*, the failure of the appellant to bring himself within the class entitled to raise the constitutional issue there presented was due to an absence of the requisite proof before the trial court. Yet this court refused either to accept additional proof, or remand the case to the state court with directions to order a new trial, but affirmed the judgments of the state court.

II.

With respect to plaintiff in error's contention that he and the beneficiaries and trustees of his assignor are being deprived of their property without due process of law, it should be observed that the record fails to show that this point was raised at the trial of the cause. Plaintiff's third ground of exception (86) shows that while the Fourteenth Amendment was mentioned by him, the privileges and immunities clause of that amendment was particularly referred to and the due process clause was not mentioned. The point is first raised in plaintiff's assignments of error in the Michigan Supreme Court (209). But the opinion of the Michigan Supreme Court (184-199) contains no hint that the due process clause was argued before the Michigan Supreme Court or considered by it; and it was not in fact argued before the Michigan Supreme Court or passed upon by it. The due process question is not properly before this court.

The two most recent cases decided by this court upon the question of jurisdiction:

> *Whitney v. California*, 274 U. S., 357, and
> *Mellon v. O'Neil*, 48 Sup. Ct. Rep., 62,

declare it a long settled rule,

> "that this court acquires no jurisdiction to review the judgment of a state court of last resort on writ of error, unless it affirmatively appears that a federal question constituting an appropriate ground for review was presented in *and expressly or necessarily decided by such state court.* * * * It is not enough that there may be somewhere hidden in the record a question which if it had been raised would have been of a federal nature." * * *

See also:

Hiawassee River Power Company v. Carolina-Tennessee Power Company, 252 U. S., 341.

Cleveland and Pittsburgh Railroad Company v. City of Cleveland, 235 U. S., 50.

Waters Pierce Oil Company v. Texas, 212 U. S., 112.

In *Thomas v. Iowa, 209 U. S., 258, 263*, this court said:

> "The federal question, if it can be found in the record at all must be found in this statement (one by the state supreme court hereinafter referred to). It is too late to raise it for the first time in the petition for writ of error from this court or in the assignments of error here. * * * All that appears in the statement is that exceptions were taken to certain parts of the charge to the jury, because they in effect deprived the plaintiff in error of his liberty without due process of law, and that the question thus raised was discussed before the supreme court of the state. But something more than this vague and inferential suggestion of a right under the Constitution of the United States must be presented to the state courts to give us the limited authority to review their judgments, which exists under the constitution, and is regulated by Section 709 of the Revised Statutes." * * *

In the recent case of *House v. Road Improvement District, 266 U. S., 175*, Mr. Justice McReynolds declared that where the only challenge to a statute was that it did not provide due process of law and violated the Fourteenth Amendment, it was not sufficiently distinct and substantial, and this court dismissed the writ of error.

In *Chapin v. Fye, 179 U. S., 127*, this court declared, at page 129:

> "If a party to an action in a state court intends to invoke for the protection of his rights the Constitution of the United States * * * he must so declare. In this case plaintiff, after judgment, excepted to the denial of his motion for a new trial on the ground, among others, that the statute in question was in violation of the Fifth and Seventh Amendments to the constitution. * * * The only reference to the Fourteenth amendment is in the assignment of errors in this court, where it is stated that the state supreme court disregarded certain portions of counsel's brief alleged to have treated of that subject. This did not meet the requirements of Section 709 of the Revised Statutes (citing cases)." * * *

Louisville & Nashville Railroad Company v. Melton, 218 U. S., 36, is directly in point. In that case the trial and appeal in the state courts proceeded solely on the theory that the appellant was being deprived of his rights under the equal protection clause, but in this court, the appellant also urged the full faith and credit clause. This court declared that the railway company had not in adequate fashion called the attention of the state court to the fact that it was relying on the full faith and credit clause and that it could not, therefore, urge it in this court.

In *Harding v. Illinois*, 196 U. S., 78, the appellant in his motion for new trial alleged that the statute under which the action was prosecuted was contrary to the Constitution of the United States, and that it was a taking of property without due process of law, and was otherwise unconstitutional. This court stated at page 86:

> "Nowhere does it appear that at any time was *any specification made as to the particular clause of the constitution* relied upon * * * nor is there anything in the record which could give rise even to a remote inference that the mind of the state court was directed to or considered the question."

The last case was cited by Mr. Justice Holmes in *Cox v. Texas, 202 U. S., 446,* where it was in effect held that, since the privileges and immunities clause of the Fourteenth Amendment was not presented in the state court, it could not be considered, even though the equal protection clause of the *same amendment was properly raised* in the state court.

III.

There is *nothing* in the record to indicate that the commerce clause was raised in the trial court. Neither do the assignments of error in the Michigan Supreme Court suggest it.

Since plaintiff in error failed to properly present the question of the commerce clause in the state courts, he may not, under the above decisions, now claim the benefit of its protection. This provision may not be now invoked for the first time.

Cox v. Texas, 202 U. S., 446, 451.

See also *Appleby v. City of Buffalo, 221 U. S., 524,* holding that assignments of error in *this court* cannot originate a right of review. See also:

Cleveland & Pittsburgh Railroad Company v. City of Cleveland, supra.
Waters-Pierce Oil Company v. Texas, supra.

IV.

It is our contention, therefore, that the writ of error should be dismissed, because the Federal questions raised are not properly before the court.

SECOND.

The Commercial Investment Trust Is a Business Entity Possessing the Attributes and Facilities of a Corporation; and the State of Michigan May Therefore Require That it Comply With the Laws Governing All Foreign Corporations.

The Commercial Investment Trust was organized under a written agreement and declaration of trust purporting to have been executed in Boston, Massachusetts, a true copy of which was filed with the commissioner of corporations and taxation of Massachusetts as required by the Statutes of Massachusetts (76; Exhibit 89, 165-180).

The Massachusetts statute (32-33) also requires the filing of a copy of the instrument with the clerk of every town where the association has a usual place of business. Amendments of the original instruments must be filed in the same offices within thirty days after adoption. The secretary of state is required by the same statute annually to print these instruments of association and amendments, as a public document. The statute also provides that such an association may be sued for contractual or tort liabilities arising out of the action of its trustees, officers or agents, and its property is subject to attachment and execution "*in like manner as if it were a corporation.*"

The instrument of organization of the C. I. T. defines the rights and powers of the trustees and of the shareholders. The rights of the shareholders are limited to the right to elect trustees at an annual meeting of shareholders (Sec. 1 of Article VI), to share in the distribu-

tion of the income (Sec. 4 of Article VII), and in the distribution of the assets upon its termination (Sec. 1 of Article VIII). The instrument expressly declares that the shareholders have no title in or to the assets, or any right to call for a partition or division of the same, or to have an accounting. The interest of the shareholders consists of ownership of securities or shares of a par value of $100 each. The shares are transferable without the consent of the remaining shareholders, by the holder in person or his attorney, upon the books of the association and not otherwise, and only upon surrender of the certificate properly endorsed. The shares are deemed personal property (Sec. 7 of Article VII; 175, 179-180).

The term of the association is limited for a definite period and it has the quality of independent life and succession, as the death of a trustee or a shareholder, and the sale by a shareholder of his interest, does not end the association (Sec. 1 of Article VIII; Sec. 3 of Article I; Sec. 7 of Article VII). It has a name under which business shall be done and instruments executed, and may have a common seal. The liability of both trustees and shareholders is limited to the assets of the association (Article V). The trustees cannot bind the shareholders' property (Sec. 1 (r) of Article II, 171).

The powers of the trustees are plenary. The entity is created for the primary purpose of dealing in commercial paper but the trustees are empowered to buy and sell real and personal property of every kind. They have absolute control and management of the assets, subject to the provisions of the articles of association (Sec. 2 of Article II). They may adopt and amend by-laws consistent with the articles of association (Sec. 3 of Article II). They may deal in its shares (Article IV).

The trustees also have the power to fill vacancies for the unexpired terms of trustees dying, resigning or unable to act (Sec. 3 of Article I). Their discretion in the handling of securities constituting part of the assets and in the investment of any moneys under their control and in the execution of any contracts or other instruments deemed by them necessary or expedient to carry out and protect the business of the association is absolute and uncontrolled (Sec. 1 (g), (k), (n) of Article II). They are empowered to deal with the trust's property and to manage and conduct the business as fully as if they were the absolute owners of the assets (Sec. 1 (o) of Article II). They may, at any time delegate to committees selected by themselves from their own number, or to officers and agents, such of their powers as they may in their discretion specify (Sec. 1 (p) of Article II). The trustees may select an executive committee from their own number and elect a president, one or more vice-presidents, a secretary and treasurer, and such other officers as they may from time to time deem expedient (Sec. 1 (r) of Article II). The books of the association shall be open to the inspection of the shareholders only when, and as, and to the extent determined by the trustees (Article X).

We have here a business unit, which by virtue of its articles of association and the attributes conferred by Chapter 184 of the Laws of Massachusetts (32-33), possesses all the usual facilities, attributes and advantages of a corporation.

Indeed, writers upon the subject point to the fact that business trusts of the C. I. T. type have the advantages and capacities of corporations without being burdened with the legislative regulations imposed upon

corporations, as a *reason for organizing a business in the trust form* rather than in the corporate form.

Professor Horace L. Wilgus, in an exhaustive article in *13 Michigan Law Review, 71, 205*, entitled "*Corporations and Express Trusts*," makes a detailed comparison of the two forms of organization, and concludes that the business trust has all the advantages and capacities of a corporation. But he immediately points to the public danger because of the absence of public control: "Upon the public side, however, so far as control is concerned, the state can reach an offending corporation more directly and positively." * * * (page 236). He might have added that this absence of public control has been the spur to the organization of business units such as the C. I. T., in that form rather than as corporations.

Professor Wilgus also quotes Maitland, "*Trust and Corporation*," *Collected Papers*, Vol. III, pages 373-376:

> "It would not, I think, be easy to find anything that a corporation could do that is not being done by this nicht rechtsfaehige Verein."

Maitland refers to the London Stock Exchange, organized in 1876 under a deed of settlement.

John H. Sears, in his "*Trust Estates as Business Companies*," Edition of 1921 (pages 5-6, 9-12), also points to the advantages to be derived from organizing an enterprise in the trust as opposed to the corporate form. He quotes (at page 6) the opinion of the Massachusetts Supreme Judicial Court in the case of *Hussey v. Arnold, 185 Mass., 202, 203*, where it was frankly recognized that the "Massachusetts Trust" there involved, was formed "to obtain for the associates *most of the advantages belonging to corporations*, without the authority of any

legislative act, and with *freedom from the restrictions and* regulations imposed by law upon corporations." * * * Sears also notes that at the time of his writing, only two states, Massachusetts and Oklahoma, had any kind of regulatory measures at all governing these trusts.

St. of Mass. of 1909, Ch. 141, as amended by *Ch. 471, St. 1914*

General Acts of Mass. of 1916, Ch. 184.
Laws of Oklahoma, 1919, Ch. 16.

The basis of the wholesale use of the trust form in recent years for business enterprises is recognized in the report of the Tax Commissioner of the State of Massachusetts for January, 1912 (which is quoted by Sears, at page 359 of his work): "Most, if not all of them have been *reorganized* from the corporate form, for the purpose of *avoiding publicity of the affairs of a business closely held*, for the greater flexibility of management, *and to avoid liability for the federal income tax.*"

A trust in which (as in the case of the C. I. T.), complete control, ownership, and management of the assets is vested in the trustees, and the rights of the shareholders are limited to a share in the profits of the business and in distribution upon termination, is clearly not a partnership.

Hecht v. Malley, 265 U. S., 144.
Betts v. Hackathorn, 159 Ark., 621.
Williams v. Milton, 215 Mass., 1.
Home Lumber Company v. Hopkins, 107 Kans., 153.
Reilly v. Clune, 234 Pac., 35 (Ariz.).

See, also, the notes in:

7 A. L. R., 612.
10 A. L. R., 887.
31 A. L. R., 851.
35 A. L. R., 502.

On the contrary, a trust such as the C. I. T. is regarded as an artificial entity existing and functioning independently of its beneficiaries and trustees, "that is, it is a *legal entity* separate from them, just as a corporation is a legal entity separate from its shareholders." Sears, *Trust Estates as Business Companies*, page 141. William C. Dunn, in his volume on "*Trusts for Business Purposes*," calls it an entity (pages 46, 52-53).

Massachusetts itself, contrary to the contention of plaintiff in error regards and deals with these trusts as entities, for, as noted above, its statutes declare that a Massachusetts trust may be sued and its property is subject to attachment and execution "*in like manner as if it were a corporation.*"

Gen. Acts of Mass. of 1916, Ch. 184.

Indeed, long ago the Supreme Judicial Court of Massachusetts held that citizens of the state of New York who were shareholders in an English association, very similar in form and effect to a Massachusetts or business trust, and organized under deeds of settlement equivalent to our declarations of trust, could not claim the benefit of the privileges and immunities provision of the Constitution because the association "*was so far clothed with corporate powers that it may be treated, for the purposes of taxation, as an artificial body, and becomes subject as such to the jurisdiction of the government*

under which it undertakes to act and contract in its associated capacity."

Oliver v. Liverpool and London Life and Fire Insurance Company, 100 Mass., 531.

This case has been cited on numerous occasions, and the Massachusetts court has never modified the rule there pronounced.

The precise constitutional issue which is here raised by the plaintiff in error has already been presented to and decisively passed upon by this court in the leading case of:

Oliver v. Liverpool and London Life and Fire Insurance Company, 10 Wall., 566,

which affirmed the Massachusetts decision, *supra*. The record in that case (10 ff) discloses that the deed of settlement under which the Liverpool company was originally organized is an instrument whereby the first parties, the original associates in the business, appointed the second parties as *trustees* to hold title to the trust property and administer same, an instrument similar in form and effect to the C. I. T. declaration of trust. The attorneys for the insurance company in that case made the identical arguments which plaintiff is presenting in the cause at bar; that the English company was simply an association of individuals, and that no new legal entity had been created; that since the Parliamentary Acts confirming to the company certain attributes expressly negatived any intention to treat it as a corporation, and nothing had been done in this country to change the legal status thus conferred by British law, it could not be treated as a corporation by the state of Massachusetts.

It was contended that the citizens of New York who were members of the association were protected by the privileges and immunities clause of the Constitution; and the subjects of Great Britain by the treaty between the United States and Great Britain.

But this court, speaking through Mr. Justice Miller, brushed aside these contentions. It pointed out that the insurance company possessed many, if not all, the attributes generally found in corporations. It had an artificial name, and it made and performed its contracts in such name. It had the right to sue and to be sued in the name of one of its officers, and the whole body of shareholders was bound by the judgment. It had the quality of perpetual succession, and its existence as an entity was recognized by the Parliamentary Act authorizing it to sue or be sued by its members.

This court then held that regardless of the declarations of the Acts of Parliament as to its legal character, the essential nature of the insurance company could not be thus altered, and that the courts of Massachusetts and the United States were not precluded from inquiring into its real character because of the Parliamentary Acts declaring the insurance company was not to be deemed a corporation. Such local English policy could not control here.

Though this business group was deemed a *partnership* by the laws of England, where it was created, this court held that Massachusetts could treat it as a corporation, and could require the payment of a specific tax as a condition precedent to doing business in Massachusetts.

The highest courts of a number of states have in recent years had occasion to consider the character of business enterprises in the Massachusetts trust form and

have declared that such a trust was a corporation within the meaning of the term corporation as defined by their constitutions and statutes.

Home Lumber Company v. Hopkins, 107 Kan., 153.
Harris v. Oil Company, 110 Kan., 532.
Hamilton v. Young, 116 Kan., 128.
Weber Engine Company v. Alter, 120 Kan., 557.
State v. Hinkle, 126 Wash., 581.
State v. Paine, 137 Wash., 566.
Reilly v. Clyne, 234 Pac. (Ariz.), 35.
Superior Oil Syndicate v. Handley, 99 Ore., 146.

An analogous ruling is found in *Warburton v. Perkins, 133 A., 141 (Md.)*, where a Massachusetts trust in the hands of a receiver, which was engaged in the business of furnishing electric current to consumers, was held to be a quasi-public service corporation within the rule giving a lien, as against the bondholders, to those creditors of public service corporations who furnished supplies to such corporations while in the hands of a receiver, upon funds derived from the collection of public service charges.

The opinion of this court on the subject is expressed in *Hecht v. Malley, 265 U. S., 144*, and *Burk Waggoner Oil Association v. Hopkins, 269 U. S., 110*. The excise tax under the 1918 Revenue Act which the Massachusetts trusts involved in the *Hecht case* were held liable to pay, and the income tax imposed upon the *Burk Waggoner* trust association, "which, although unincorporated, transacts its business as if it were incorporated," were not imposed upon natural individuals or trustees, but against *corporations*, as defined by Section 1 of that act. If such trusts were nothing but groups of individual citizens operating through trustees, and not

separate entities distinct from their shareholders and trustees, their inclusion in the classification "corporations" would never have been made.

A discussion of this question in *Harvard Law Review, Vol. XLI, page 86*, which comments upon the decision of the Michigan court in the cause at bar, cites a considerable list of authorities in which the Massachusetts trust has been considered a distinct legal entity, including *Peabody v. Stevens, 215 Mass., 129*, in which it was held, with reference to a state inheritance tax on the shares of a decedent in a Massachusetts trust:

> "In this respect the case is indistinguishable in principle from shareholders in a domestic corporation."

The writer then goes on to say:

> "The business trust, having been treated as a legal entity for many purposes might, in the nature of things, be treated as such in the determination of constitutional questions. And if a business trust is to be regarded as an entity, it would seem that it would stand in no better position than a corporation, which is denied citizenship within the privileges and immunities clause." * * *

As Michigan has the right in the exercise of its legislative power to regard the C. I. T. as being a legal entity or equivalent thereto, it is not entitled to the benefit of the protection given to *natural persons*, citizens of the states and of the United States, which is given by Sec. 2 of Article IV and the privileges and immunities clause of the Fourteenth Amendment.

Paul v. Virginia, 8 Wall., 168.

Orient Insurance Company v. Daggs, 172 U. S., 557, 561.

Western Turf Association v. Greenberg, 204 U. S., 359, 363.

Selover, Bates & Company v. Walsh, 226 U. S., 112, 126.

The underlying reason for these decisions is stated to be that a corporation is not a *natural* person.

Plaintiff has cited and quoted from *Slaughter House cases, Ward v. Maryland, Corfield v. Coryell,* and *Hess v. Paulosky.* There is nothing in any of these cases supporting or even remotely touching upon the broad proposition urged by plaintiff that the entity character of the C. I. T. should be disregarded and that the attention of this court be directed solely to such rights as the shareholders or trustees of the C. I. T. might claim in their individual and natural capacities. Plaintiff's claim in this regard amounts to an assertion that by forming the C. I. T. and creating that entity, the shareholders and trustees conferred upon it those privileges and immunities to which they were entitled as natural persons. This claim is precisely the reverse of the correct doctrine.

Bank of Augusta v. Earle, 13 Peters, 519, 587.

> "The only rights it (a corporation) can claim are the rights which are given to it in that character, *and not the rights which belong to its members as citizens of a state.*"

In any sound system of jurisprudence, rights and duties are correlative. When an individual becomes a member of a corporation or similar entity such as the C. I. T., and thereby acquires among other things the strictly group privilege of limited liability, he must also, to the extent that he is a shareholder in such entity yield his purely personal rights and privileges

and accept the burdens of the collective body. This was made clear by Chief Justice Marshall in *The Bank of United States v. The Planters' Bank of Georgia, 9 Wheat, 904:*

> "It is, we think, a sound principle, that when a Government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. Thus, many states of this Union who have an interest in banks, are not suable even in their own courts; yet they never exempt the corporation from being sued. * * *
>
> The Government of the Union held shares in the old Bank of the United States; but the privileges of the Government were not imparted by that circumstance to the bank." * * *

Earlier in the opinion, the Chief Justice declared that:

> "The state does not, by becoming a corporator, identify itself with the corporation."

In *Bank of South Carolina v. Gibbs, 2 McCord Reports (S. Carolina), 226,* the South Carolina court, following the *Planters' Bank case,* held that a debt owing to the Bank of South Carolina, whose stock was *all* owned by the state, was nevertheless not a public debt entitling the bank to priority in the distribution of a decedent's estate.

In *Turnpike Company v. Wallace, 8 Watts (Pa.), 316,* it was held that the fact that the state held stock in a business corporation, did not make such a corporation

a public corporation exempting it from executions against its property.

We have searched the record in vain for any intimation that any shareholder or trustee, or any other natural person other than agents and officers of the C. I. T. came to Michigan to acquire property or to engage in business. On the other hand, the list of 198 chattel mortgages purchased by the C. I. T. in Detroit in 1920, assignments of which to the C. I. T. were filed for record by the C. I. T. in the office of the clerk of the city of Detroit is convincing evidence of the active presence in Michigan of the C. I. T. entity.

The argument of plaintiff assumes that statutory corporations are the only legal entities distinct from natural persons. Far from it. We have already pointed out that business trusts have often been treated by this and other courts as legal entities. There are other types of legal entities, familiar to all of us, and recognized by the adjudicated cases.

In *Ponce v. Roman Catholic Apostolic Church in Porto Rico, 210 U. S., 296*, it was contended the Supreme Court of Porto Rico had no jurisdiction over a controversy between the City of Ponce and the plaintiff church involving the title to certain land, because the plaintiff church was not a judicial person, or a legal entity, and was not incorporated. This court, after admitting that the ordinary corporation laws were inapplicable, recognized that the plaintiff church had legal or juristic personality and the consequent capacity to acquire and hold property, and to sue in the courts. Chief Justice Fuller's opinion (at page 314) cites and quotes with approval the early case of *Terrett v. Taylor, 9 Cranch (U. S.), 43*, where this court laid down a similar rule

with respect to the episcopal churches which owned property in this country at the time of the revolution.

The *Ponce case* is followed in:

Santos v. Holy Roman Catholic and Apostolic Church, Parish of Tambobong, 212 U. S., 463.

Professor Wilgus, in his article on *Corporations and Express Trust, supra*, points out that the concept of the artificial personality of a group, as separate from the individuals composing it, dates back to prehistoric times.

The corporation sole of the common law is an artificial entity, and it was early held, in *Governor v. Allen, 8 Humph. (27 Tenn.), 176*, that the office of Governor was a corporation sole. Other instances of "corporation sole" are referred to by Thompson in Section 17 of his *Work on Corporations (3rd Ed.)*.

It was also held in an early case that a voluntary association which for a long period of time had assumed rights and committed acts which were corporate in their nature and could not have been performed by an unincorporated body, will be presumed a corporation under a rule analogous to the rule of prescription.

Greene v. Dennis, 6 Conn., 292.

Defacto corporations are distinct legal entities even though, in the words of the Pennsylvania Supreme Court in *In re Gibb's Estate, 157 Pa. St., 59*, they lack the *"creative fiat of the law."*

Thompson on Corporations, Third Edition, Sec. 245.

Fletcher, Cyclopedia of The Law of Private Corporations, Sec. 273.

Joint stock associations organized in New York are held quasi-corporations or *legal entities* similar to corporations by the courts of that state.

Westcott v. Fargo, 61 N. Y., 542.
Hibbs v. Brown, 190 N. Y., 167.
United States v. Adams Express Company, 229 U. S., 381, 399.

In *In re Carthage Lodge, 230 Fed., 694, 700*, a fraternal lodge organized under the New York Benevolent Orders Law, which had elected three trustees who by statute were given power to hold and convey, manage, sue for and recover all the lodge property, was held a legal entity, and a corporation within the Bankruptcy Act.

In Michigan limited partnership associations have been held legal entities, to be treated in some respects as corporations.

Rouse Hazzard & Company v. Detroit Cycle Company, 111 Mich., 251.
Staver & Abbott Company v. Blake, 111 Mich., 282.
Armstrong v. Stearns, 156 Mich., 597.
Union Trust Company v. Detroit Common Council, 170 Mich., 692.

In a very recent article in *27 Yale Law Journal, 283*, by Bryant Smith, it is pointed out that a factor in the attribution by lawyers and courts of legal personality to a group of individuals comprising a corporation, is the tendency of the human mind to disregard the individuals composing a group when dealing with group functions. Limited liability, independent succession, capacity to sue and be sued in the corporate name, etc., are all strictly group functions, which have evolved out of the

supposed desirability of securing the tremendous economic advantages of such group functions. Individual shareholders "and even presidents and boards of directors lose their identity" in the group. The writer dismisses what he calls the "concession theory" of the creation of corporations by legislative act as a mystification of the concept of corporate personality, and cites joint stock companies and *de facto* corporations as examples to show that "the legislative grant is by way of control rather than an act of creative magic." He also notes that there are many cases in which the corporate veil has been lifted by the courts. If corporate personality is entirely a gift of the legislature, it is not easy to understand how the courts can disregard its existence while the corporation retains life. Summarizing, Mr. Smith says:

> "Whenever society, in the administration of justice, sees fit to disregard the individual members of an organization for a particular purpose, and for that purpose to look upon the organization as a unit, the organization to that extent or for that purpose becomes a legal person. *This is true even where the group is organized as a partnership or other unincorporated association.*"

The writer also cites *Raymond, The Genesis of the Corporation, 19 Harv. L. Rev., 350:*

> "The extent to which a group is treated as one by those dealing with it depends entirely on the demands of practical convenience."

He also quotes *Warren, Collateral Attack on Incorporation, 21 Harv. L. Rev., 305:*

> "There is therefore nothing in the nature of things which prevents a court from *recognizing as a legal unit a body of persons unauthorized by the*

sovereign to act as a unit, but in fact acting as a unit."

Also 3 *Maitland, Collected Papers (1911), 314:*

> "If the law allows men to form permanently organized groups, those groups will be for common opinion *right and duty bearing units;* and if the law giver will not openly treat them as such, he will misrepresent, or as the French say, he will 'denature' the facts; in other words, he will make a mess and call it law."

The C. I. T., as we have seen, is by reason of similarity of structure, functions, capacities, powers and legal incidents, indistinguishable except in manner of creation from the ordinary statutory corporation. We are not now concerned with the character and extent of its specific powers and obligations; the precise manner of its creation is therefore not significant, and the legislature and courts of the state of Michigan can therefore treat it as they do a corporation organized under statutes. Nor can the C. I. T.'s true character be hidden behind the mask of the name given to its organization. The term "Common Law Trust," or "Massachusetts Trust," as has been well said by Ellis, J., in *Willey v. W. J. Haggson Corporation, 90 Fla., 343, 354,* has reference merely to "the method of its creation" and does not alone adequately define its character.

Neither should the C. I. T. be permitted to escape the consequences of its form of organization because its managers and directors are called "Trustees." This is not the ordinary case of the creation of a strict trust by a testator or settlor with the simple duty in the trustee or trustees to collect and distribute the income of the trust property. We have here an association and organization of individuals, in a form allowing the

concentration of a large amount of capital, for the purpose of engaging in large scale business enterprise, and involving, for the managers and directors of such business, all the complex duties which the conduct of a large modern business implies.

The Massachusetts statute which makes the association's property subject to execution and attachment "in like manner as if it were a corporation," does not apply to strict trustees. Strict trustees do not raise capital, or issue transferable shares of participation in *income* and *surplus*. Neither are the various activities of strict trustees affected with that degree of public concern which is expressed in the case of the C. I. T. by the statutory obligation imposed upon it to file its articles and amendments with the *Commissioner of Corporations and Taxation*, and with the clerk of every town where it has a usual place of business, and especially by the provision requiring the secretary of state to annually *print* declarations of trust of organizations such as the C. I. T. as "a public document." This "public document" thus contains and constitutes an express representation to the public that the trust entity proposes to engage in certain well defined and continuous business activities. The activities of strict trustees do not have such a continuity of planned and organized transactions in furtherance of a definite business enterprise.

The distinction between a strict trust and a business organization such as the C. I. T. is clearly pointed out by this court in *Hecht v. Malley, supra, at pages 159 161*, in discussing the nature of the Wachusett Realty Trust. It was strenuously urged in that case that the Hecht and Haymarket Trusts, organizations similar in structure and function to the C. I. T., were strict trusts and not corporations within the meaning of the 1918 Revenue Act, and *Crocker v. Malley, 249 U. S., 223*, was cited to sustain

their contention. This court however clearly distinguished the *Crocker case*, which involved the Wachusett Realty Trust, upon the theory that the trustees of the Wachusett Realty Trust were

> "merely holding property for the collection of the income and its distribution among the beneficiaries, and were not engaged, either by themselves or in connection with the beneficiaries, in the carrying on of any business. * * *
>
> It results that *Crocker v. Malley* is not an authority for the broad proposition that under an act imposing an excise tax upon the privilege of carrying on a business, a Massachusetts trust engaged in the carrying on of business in a quasi-corporate form, in which the trustees have similar or greater powers than the directors in a corporation, is not an 'association' within the meaning of its provisions.
>
> We conclude, therefore, that * * * *as the petitioners (the trustees) are not merely trustees for collecting funds and paying them over, but are associated together in much the same manner as the directors in a corporation for the purpose of carrying on business enterprises, the trusts* are to be deemed *associations* within the meaning of the Act of 1918; * * *"

This court cited the leading English case of *Smith v. Anderson, L. R., 15 Ch. Div., 247*, in which the same distinction is made.

The trustees of the Crocker Association, which was also involved in the case, and which had been *reorganized* from the original Wachusett Realty Trust so as to enable it to engage in the manufacturing business (148-149) admitted that since its reorganization it was no longer a strict trust but an "association" within the meaning of the 1918 Revenue Act. This admission is far-reaching, for had they been strict trustees, they could have claimed

the same exemption from the association tax as was accorded them in *Crocker v. Malley, supra*, in their capacity as trustees of the Wachusett Realty Trust.

The inherent similarity in the two forms of organization becomes still more apparent when we realize that it is universally held that the directors and shareholders of a corporation bear a similar trustee—*cestui que trust* relationship to each other that the trustees and shareholders of a Massachusetts trust bear as between themselves.

> *Thompson On Corporations (3rd Ed.), Chapter 49.*

That writer declares, in Sec. 1320:

> "The rule is thoroughly imbedded in the general jurisprudence of both America and England that the status of directors is such that they occupy a fiduciary relation toward the corporation and its stockholders, and are treated by courts of equity as trustees."

Cook states the rule as follows:

> "It is frequently said, both in the cases and in the text books, that the directors of a corporation are practically trustees, with the whole body of the stockholders as *cestui que trust*."
>
> *Cook On Corporations (8th Ed.), Ch. XXXIX, Sec. 648.*

In *Fletcher's Cyclopedia Of The Law of Private Corporations, Sec. 2263*, it is also stated that in some of the western states, it is common for the courts to apply to directors the statutory rules governing trustees in general.

The soundness of the decision of this court in the *Liverpool case* cannot seriously be questioned. While

corporations have grown enormously in size and complexity since the days of that decision, their fundamental properties have remained the same, and these the C. I. T. possesses as did the Liverpool Insurance Company.

It was early stated in the *Dartmouth College case, 4 Wheat, 518 (at 636)*:

> "Among the most important (properties of a corporation) are immortality, and if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use."

Though separated by a period of over a hundred years, the analysis of essential corporate properties and capacities found in the opinion of the Kansas Supreme Court in *Hamilton v. Young, supra, at page 135*, is substantially the same as that of this court.

> "The fundamental concept of a corporation is that it has existence distinct from the persons comprising it. It is a legal entity which may act on its own account, through organs of activity commonly called trustees, directors, officers, and agents. Since the Victory Oil Company (the Massachusetts Trust involved), has the constitutional characteristics, it is a corporation." * * *

In *Providence Bank v. Billings and Pittman, 4 Peters, 514, 561*, this court declared that

> "The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men. This capacity is *always* given to such a body."

In *Flint v. Stone Tracy Company*, 220 U. S., 107 this court stated at page 162:

> * * * "The continuity of the business without interruption by death or dissolution, the transfer of property interests by disposition of shares of stock, the advantage of business controlled and managed by corporate directors, the general absence of individual liability, these and other things inhere in the advantages of business thus conducted (as a corporation), *which do not exist when the same business is conducted by private individuals or partnerships.*" * * *

The specious reasoning involved in the argument that an organization is not a corporation, if not called a corporation by the laws under which it is created, is forcefully brought out in the opinion of Cowen, J. in *Thomas v. Dakin*, 22 Wend. (N. Y.), 9 (1031):

> "If they (certain business associations organized under a statute) *have the attributes of corporations, if they are so in the nature of things, we can no more refuse to regard them as such, than we could refuse to acknowledge John or George to be natural persons, because the legislature may,* * * *have been pleased to designate them as belonging to some other species.* * * * Even an express legislative declaration that certain associations are not included in the definition of corporations, would not change their character, provided they should in fact be clothed with all the essential powers of corporation." * * *

In *Keystone Bank v. Donnely*, 196 Fed., 832, a limited partnership organized under a Pennsylvania statute

"had all the essential earmarks of a corporation," and was held to be such.

Joint stock associations organized under the New York Joint Stock Association Act have been held quasi-corporations because of their similarity in form and substance to corporations.

Westcott v. Fargo, 61 N. Y., 542.
Hibbs v. Brown, 190 N. Y., 167.
United States v. Adams Express Company, 229 U. S., 381.

Though the *Liverpool case* has been before this court on numerous occasions, its rulings on the questions now presented have never been questioned, and it has been frequently cited.

Blake v. McClung, 172 U. S., 239, 259.
United States v. Adams Express Company, 229 U. S., 381, 390.

In the last case the *Liverpool case* was cited by Mr. Justice Holmes as authority for sustaining the validity of the service of a summons in a criminal case against the defendant joint stock association in its company name by service upon its general agent.

See also:

Board of Levee Inspectors of Chicot County v. Crittenden, 94 Fed., 613, 616.
Kirven v. Virginia-Carolina Chemical Company, 145 Fed., 288, 292.
United States v. American Express Company, 199 Fed., 321, 324.
Fargo v. Powers, 220 Fed., 697, 707.

In re Carthage Lodge, No. 365, I. O. O. F., 230 Fed., 694, 699.
Real v. Carpenter, 235 Fed., 273, 277, and
State v. Hinkle, 126 Wash., 381, 384.

in which, following the rule of the *Liverpool case*, a Massachusetts Trust was held subject to the corporation laws.

Appellant has cited *Schumann-Heink v. Folsom, ... Ill., ...; 159 N. E., 250 (1927),* and *Baker v. Stern, ... Wis., ...; 216 N. W., 147 (1927).* These cases, it is submitted, are not in point. In the *Schumann-Heink case*, an attempt was made by a bill in equity to fasten individual liability against one of the trustees of a business trust. The action arose out of a written contract between plaintiff and the trust. The trust instrument, which was referred to in said contract, contained a provision exempting the trustees from individual liability. The chancellor held that the exemption from individual liability was valid. This decision was affirmed. The Illinois corporation laws were not involved. As to the *Baker v. Stern case*, plaintiff is in error when he states (page 35 of his brief) that the trust instrument there involved was [redacted] to that in the *Schumann-Heink case*. The trust in the *Baker case*, was clearly not a business trust, but a real estate trust. The suit was to compel specific performance of a contract for the sale of said realty. The court held the contract of sale was specifically enforceable. The Wisconsin corporation laws were not involved.

Plaintiff does not correctly state the point of the decisions of this court in applying the Revenue Laws to business trusts.

In *Eliot v. Freeman*, and in *Hecht v. Malley, supra*, this court, in passing upon the problem of construction,

held that by virtue of the particular wording of the Revenue Act of 1909 and of the 1916 Revenue Act, "corporation" meant statutory corporation, and that a business trust was obviously not a statutory corporation. But this court also held in *Hecht v. Malley* and *Burk Waggoner Oil Association v. Hopkins*, in construing the *1918* Revenue Act, from whose definitive section the qualifying words "organized under the laws" had been removed and replaced by "organized in" that the term "corporation" under this act was not limited to statutory corporations, and therefore *included* business trusts such as the C. I. T. The effect of these decisions is that such a business trust may be treated as *a corporation*, even though not a statutorily organized corporation.

Plaintiff also cites *Great Southern Fireproof Hotel Company v. Jones, 177 U. S., 449.* The Pennsylvania limited partnership there involved was held not to be a corporation within the meaning of the rule giving jurisdiction to federal courts in suits in which the parties are of diverse citizenship. As is pointed out by Mr. Justice Harlan in the opinion the rule is a jurisdictional one and for that reason was not extended beyond its application to strict corporations. But this does not mean, and the court did not say, that an organization possessing corporate attributes may not, for other purposes, be deemed corporations.

In *Hecht v. Malley*, this court held applicable to Massachusetts Trusts such as the C. I. T. the federal corporation excise tax which had been held constitutional in *Flint v. Stone Tracy Company, 220 U. S., 107.* The tax was imposed upon the privilege of "the doing of business in a corporate capacity." It follows that a state could also impose an excise tax upon Massachusetts Trusts for the privilege of doing business in a "corporate capacity." It follows that a state may, in order to

enforce payment of the tax, require such a foreign trust which seeks the privilege of transacting its business in such state in a "corporate capacity," to pay such tax upon its entrance into the state, and may invalidate contracts made by such trust while doing business in the state without having met such requirements as to qualification. How else can a state reach the foreign legal entity?

To sustain appellant's contention that such sanction may not be imposed would result in chaos. All existing corporations may reorganize in the business trust form, and proceed to do business in all states without restriction. The revenue legitimately derived from foreign corporations by states in which they do business, the protection afforded by such states to their own citizens in the form of statutes providing for the appointment of agents to accept service of process, filing of copies of the charters of such foreign corporations and annual reports, and providing that the business which such foreign corporations seek to transact shall be such as is permitted to domestic corporations, etc., all would be swept away.

THIRD.

The Michigan Foreign Corporation Act, As Applied To The Commercial Investment Trust, Is A Valid Regulation Of The Right Of Citizens Of Other States To Engage In Business In Michigan.

The rights and privileges claimed by plaintiff for the individuals composing the C. I. T., to make and enforce Exhibit 1, to accept a trust, to come into Michigan and there engage in business, make contracts, buy and sell property, are not the privileges and immunities of citizens

of the *United States* which are protected from impairment by the Fourteenth Amendment. The distinction between the privileges and immunities of citizens of the states under Section 2 of Article IV of the Constitution, and those accruing to citizens of the *United States* as such, was early pointed out in the *Slaughter House cases* and has been consistently adhered to since.

Slaughter House Cases, 16 Wall., 36, 74, 77.
Maxwell v. Bugbee, 250 U. S., 525, 537-538.
Ownby v. Morgan et al., 256 U. S., 94, 113.

The privileges and immunities claimed by plaintiff are not, in the words of the last cited case, "such as owe their existence to the Federal Government, its national character, its constitution, or its laws."

Plaintiff has enumerated a number of rights which he claims the shareholders and trustees of the C. I. T. are entitled to as their privileges and immunities as citizens of states other than Michigan. Assuming, for the sake of argument, that there are rights and privileges of these shareholders and trustees in their natural and individual capacities involved, we submit that these rights and privileges have not been violated, abridged or impaired within the meaning of the second section of Article IV. The right of citizens of other states to engage in business in this state, to acquire and hold property, to make contracts, etc., is not unlimited.

Professor Austin W. Scott in an article in *Harvard Law Review, Volume XXXII, page 871*, states that it does not follow because the state cannot *exclude* nonresident persons that it may not impose proper conditions upon their admission, in the exercise of its power reasonably to regulate business carried on in the state. The writer goes on to state the general, well settled rule that a state under

its police power, may regulate the right of nonresidents to carry on business within the state. Constitutional inhibitions against interference with interstate commerce, the taking of property without due process, the denial of equal protection, or of the privileges and immunities of citizens, are not deemed violated if the restrictions imposed are a reasonable exercise of such power to regulate the business done in the state. Professor Scott states that nonresident individuals should be bound by conditions imposed upon their doing business in a foreign state, upon the same reasoning that was advanced by Judge Hand in *Smolik v. Philadelphia and Reading Coal and Iron Company*, 222 Fed., 148. This case held that a foreign corporation which had not appointed an agent to accept service of process as a condition to doing business in the state, was bound by a service upon the official designated by the statute, at least as to causes of action arising from the business done in the state. The reason is that when a foreign corporation *voluntarily* does business in a state, the courts of that state, in the interests of *justice*, will treat such foreign corporation as though it had consented to become bound by such service upon a state official, as a reasonable regulation of its business.

Pennsylvania Fire Insurance Company v. Gold Issue Mining & Milling Company, 243 U. S., 93, approved Judge Hand's opinion, as did also *Bagdon v. Philadelphia and Reading Coal and Iron Company*, 217 N. Y., 432, 437.

In a recent article by Herbert Barry in *11 Virginia Law Review, 175*, it is suggested that the same principles should be applied in solving the question of jurisdiction in an action against a simple or quasi-corporate group or association of nonresident individuals.

This court has recently rendered an opinion in which jurisdiction over a nonresident was supported under a Massachusetts statute though no personal service was obtained and no general appearance entered by the defendant nonresident, which can be properly explained, in our opinion, only upon the theory of the power of a state to reasonably regulate nonresident individuals in the exercise of their rights, privileges, and immunities in a state other than that of their residence.

In *Hess v. Pawloski, 274 U. S., 353.*
Kane v. New Jersey, 242 U. S., 160, and
Hendrick v. Maryland, 235 U. S., 610,

this court sustained criminal convictions of nonresidents by the courts of those two states for the violation of those portions of the state motor laws applicable to nonresidents and expressly affirmed the right of a state to reasonably regulate nonresident motorists in their use of the state highways and to impose reasonable license fees upon such nonresidents.

Hess v. Pawloski, supra, was followed when a rehearing was denied in the case of *State v. Belden, 211 N. W. (Wis., 1927), 916; 214 N. W., 460,* Rosenberry, J., speaking for the court on the first hearing clearly enunciated and definitely adopted the theory of the power to reasonably regulate nonresidents as the basis of jurisdiction over them.

> * * * "But as already intimated power to prohibit is not the sole basis of jurisdiction, *power to regulate* is a basis of jurisdiction of equal dignity." * * *

Citing *Kane v. New Jersey, supra,* the Wisconsin court definitely held there was no violation of the privileges

and immunities clauses or of the due process clause in assuming such jurisdiction.

This court has also held, in negativing the argument that power to prohibit can be the only basis of jurisdiction over a foreign corporation, that though a foreign corporation transacts only interstate business in a state and such state has therefore no power to prohibit the entrance of such foreign corporation, nevertheless such corporation, by such doing of business, subjected itself to the jurisdiction of the state.

> *International Harvester Company v. Kentucky, 234 U. S., 579.*

A case similar to the Wisconsin case, and likewise containing a clear statement of the same theory as to the basis of jurisdiction over nonresidents is *Pizzutti v. Wachter, 134 A. (N. J., 1926), 727, 729.*

> "We think the basis of jurisdiction in the present case over the defendant, who was not a citizen of this state, not served with process within the state, and who has not expressly consented to the exercise of jurisdiction of our courts over him, rests upon the doctrine that *a state may, without violating any constitutional limitation,* (in this case the defendant had contended the New Jersey statute violated the privileges and immunities clauses and the due process clause) *forbid the doing of certain acts within the state unless and until the person who does the acts has consented to the jurisdiction of the courts of the state as to causes of action growing out of the doing of such acts within this state.*" * * *

While we are not directly concerned with the problem of jurisdiction over nonresidents, we are vitally concerned with the existence and character of the power to regulate nonresidents which is the true basis of such jurisdiction. And, as pointed out by Professor Scott in

an article in *39 Harvard Law Review, 563*, when a non-resident engages in a continuous series of acts of business in a state the exercise by the state of its power of regulation is justified.

In *41 Harvard Law Review, 86*, supporting the decision of the Michigan court in the cause at bar, it is suggested that the validity of such restrictions be based, not upon a power of exclusion, but rather upon the "power of reasonable supervision over citizens entering of right." The writer cites as examples of cases upholding such supervision:

Hendrick v. Maryland, supra.
Kane v. New Jersey, supra.
Hess v. Pawloski, supra.
State v. Stone, 118 Mo., 388.
Headley v. Purifoy, 107 Ala., 276.
State v. Board of Insurance Commissioners, 37 Fla., 564.

In this connection it should be noted that plaintiff does not here claim, and did not claim in the state courts, that the Michigan legislation was discriminatory or denied the C. I. T. or its members, the equal protection of the laws. No such claim can be made. Michigan perhaps may not require citizens of other states who wish to do business in the trust form to incorporate in Michigan before permitting them to engage in business within its confines, but it certainly may, in order to enforce its own policy with relation to such trusts, require them to domesticate in the same manner as foreign corporations.

See:

41 Harvard Law Review, page 89, Note 20.

The Foreign Corporation Act of Michigan, Secs. 9063-9072, Compiled Laws, 1915, requires the appointment of an agent to accept service of process, and also provides for service upon any officer or agent of the foreign corporation in Michigan, or upon the secretary of state. It also provides for the acquisition of revenue by compelling the payment of a franchise fee upon admission, and an additional franchise fee upon an increase in the amount of property used in Michigan (Secs. 9065, 9067). Both these purposes are expressly authorized by the cases above cited, and the requirement as to domestication is merely a means for attainment by the state of objectives which have received the sanction of this court, a reasonable regulation of nonresidents. The fact that Exhibit 1 is invalidated because of the C. I. T.'s failure to comply with these valid restrictions, cannot by itself be a violation of any constitutional rights which the C. I. T.'s shareholders or trustees may have. For, as observed by Mr. Justice Brandeis in *Kane v. New Jersey, supra, at page 167*:

> "We know that ability to enforce criminal and civil penalties for transgression is an aid to securing observance of laws."

This court's decision in *Flexner v. Farson, 248 U. S., 289*, does not militate against this view. In the first place the Kentucky Statute involved in that case made no distinction between suits on causes of action accruing in Kentucky and out of the business there done by the nonresident partnership and those based on causes of action arising elsewhere, and to that extent the Kentucky legislature attempted to extend the jurisdiction of its courts over nonresidents beyond the confines within which it could properly exercise that power of regulation which is the true basis of the jurisdiction of a state over nonresidents doing business therein. In

the second place, it appeared that the agent of the foreign partnership residing in Kentucky upon whom the statute authorized service of process, was at the time of such service no longer the agent of the partnership and not therefore within the terms of the statute.

The cases decided by this court, to which we have referred, definitely support the proposition that even if the C. I. T. is considered as no more than a collection of individuals, the application of the Foreign Corporation Act to the C. I. T. should be sustained as a proper exercise by the state of its regulatory powers over nonresidents seeking and exercising the privilege of engaging in business in Michigan.

Another consideration of importance is that the privileges enjoyed by citizens in their own state are not secured to them in other states by the privileges and immunities provision. It merely entitles them to claim the privileges and immunities of citizens of the state into which they come.

In *Paul v. Virginia*, *supra*, it was said, at page 180:

> "But the privileges and immunities secured to citizens of each state in the several states, by the provision in question, are those privileges and immunities which are common to the citizens in the *latter* states under *their constitution and laws* by virtue of their being citizens. *Special privileges enjoyed by citizens in their own states are not secured in other states by this provision.* It was not intended by the provision to give to the laws of one state any operation in other states. They can have no such operation, except by the permission, express or implied, of those states. The special privileges which they confer must, therefore, be enjoyed at home, unless the assent

> of other states to their enjoyment therein be given."

In *Corfield v. Coryell, 4 Wash. Cir. Ct. Reports, 371,* we find Washington, J., saying:

> "But we cannot accede to the proposition which was insisted on by the counsel, that under this provision of the constitution, the citizens of the several states are permitted to participate in *all the rights* which belong exclusively to the citizens of any other particular state, merely upon the ground that they are enjoyed by those citizens."
> * * *

See, also:

Slaughter House Cases, 16 Wall., 36, 77.

Massachusetts extends to her citizens the privilege of engaging in business in a corporate capacity in the form of a Massachusetts trust. But no such privilege is extended by Michigan to her own citizens, though plaintiff assumes it is (Brief, page 16).

In a series of decisions construing the Michigan constitutional and statutory provisions in reference to the organization of corporations, the Michigan Supreme Court has in effect held that a *domestic association* which comes within the constitutional definition of corporation in Michigan, cannot have any legal existence in Michigan unless it is expressly authorized by a general incorporation law and is formally incorporated under it.

Isle Royale Land Corporation v. Osmun, 76 Mich., 162.

Schuetzen Bund v. Agitations Verein, 44 Mich., 313.

Dodge v. Mizner, 42 Mich., 332.

Mason v. Perkins, 73 Mich., 303.

It is to be noted that in the case at bar the Michigan Supreme Court held the C. I. T. to be a corporation within the meaning of the State *Constitution* (per Fellows, J.):

> "It is the duty of this court to look beyond the form to the substance, to strip them of their finery and to apply the *constitutional* and statutory definition of corporations to them. Discharging such duty we hold that under our *constitution* and statutes the Commercial Investment Trust is a corporation." * * *

This is very significant, for the Michigan General Laws relating to the organization of domestic corporations which were passed in pursuance of Article XII of the Michigan Constitution, contain no definition of the term corporations. It must follow, therefore, that the definition of "corporation" found in Section 2 of said Article XII is the only definition to be applied in determining what organizations and associations must incorporate under such general laws. This definition, quoted in the opinion of the Michigan court in the case at bar, is the same as that of the Foreign Corporation Act. It is therefore clear that if the C. I. T. were organized in Michigan, it would not be recognized as validly existing unless it complied with the Domestic Corporation Laws.

No other conclusion is possible from the opinion of the Michigan Supreme Court.

Michigan is not alone in holding that Massachusetts trusts as such are in conflict with local policy, and will not be recognized unless organized and created as corporations under legislative sanction.

In *State v. Paine, 137 Wash., 566,* the Washington Supreme Court, following the earlier *State v. Hinkle*

case, 126 Wash., 581, held that under its corporation laws, both constitutional and legislative:

> "The state has said, as is its right, *that no one shall exercise corporate powers except those upon whom the state has chosen to confer such powers, and, in order to be able to exercise those powers, which were created by virtue of law, an artificial person, that is, a corporation should be created.*"

In the *Hinkle case*, the Washington court, interpreting constitutional provisions relating to corporations similar to those found in the Michigan Constitution, held:

> "Under the mandatory provisions of the constitution, the so-called common law trust is prohibited from doing business within this state. Our corporation laws are sufficiently broad to include every desired form of organization, and there is no reason for resorting to this form of organization except for the purpose of avoiding the payment of the fees, assessments and taxes imposed upon corporations in general, and to avoid their statutory regulations. It would seem that the framers of our constitution anticipated such tendency, and wisely provided that the term 'corporations' should include all associations and joint stock companies having any powers or privileges of corporations not possessed by individuals or partnerships, and thereby prevented the formation of the self-organized associations of every kind for the purpose of transacting business without meeting the obligations and complying with the statutory regulations of corporations." * * *

Similar decisions have been made by the highest courts of Arizona, Oregon and Kansas.

Reilly v. Clyne, 234 Pac., 35 (Ariz.).
Superior Oil Syndicate v. Handley, 99 Ore., 146.
Weber Engine Company v. Alter, 120 Kan., 557.

These decisions were relied upon and followed by Justice Fellows in the case at bar.

The cases cited by plaintiff on pages 21-26 of his brief, to establish his contention that Michigan may not impose upon a citizen of another state conditions precedent to his engaging in business in Michigan do not at all support him. In the first place, in no one of these cases was the power to regulate nonresident individuals, which is the basis of the recent decisions of this and other courts, discussed or passed upon. Indeed in *Barnes v. People, 168 Ill., 425*, it is expressly stated that the provision of the Illinois Statute which was attempted to be applied to the agent of citizens of New York, did not in fact apply to individuals, but only to foreign corporations.

In *Hoadley v. Insurance Commissioners, 37 Fla., 564*, it is also expressly stated that the court is not

> "dealing, in this opinion, with * * * the question of the right of the state to exclude * * * citizens * * * of other states, from the business of insurance here."

We have cited this case *supra* as an example of the exercise by a state of the power to regulate nonresident individuals desiring to engage in business in such state. The nonresidents in question, though admittedly not a corporation or even a quasi-corporation, had actually complied with the Florida Statute regulating their right to engage in the insurance business in the state in *all* respects save the one which was held invalid because discriminatory. Moreover, they raised no question whatever as to the right of the state of Florida to impose the restrictions with which they had complied.

In each of these cases the true basis of the decision was that the objectionable legislation was *discriminatory*. These cases are therefore inapplicable, as Michigan policy clearly prohibits its citizens from forming business trusts of the C. I. T. type, but compels incorporation in such cases. There is no discrimination therefore, in compelling the C. I. T. as a foreign trust, to comply with the Michigan Foreign Corporation Act.

This conclusion is supported by *Travis v. Yale & Towne Mfg. Company, 252 U. S., 60*, cited by plaintiff. This court there held, at page 76, that the mere fact that a New York statutory provision directing the tax upon the taxable income of nonresidents to be withheld at its source was not equally applicable to residents, was insufficient to constitute an unconstitutional discrimination. This provision was held simply a "*convenient substitute*" for the failure to impose personal liability for their income taxes upon such nonresidents. So in the cause at bar, the requirement as to the domestication of the C. I. T. is simply a convenient method of enforcing Michigan's local policy forbidding local Massachusetts trusts unless organized under the general laws as corporations.

FOURTH.

The Application of the Foreign Corporation Act to the Commercial Investment Trust Does Not Deprive It of Property Without Due Process of Law.

Plaintiff raises the due process clause in the statement of points to be relied upon (205-207) but does not argue it in the brief.

It has been seen that the acquisition of Exhibit 1 by the C. I. T. is not protected by the privileges and immunities clauses. It follows that there was no deprivation of its property without due process.

This court, in the leading case of *Blake v. McClung, 172 U. S., 239*, has definitely decided that a foreign corporation cannot escape the effects of the rule so often laid down by this court that a corporation is not a "citizen" within the meaning of Section 2 of Article IV of the United States Constitution, by claiming it is a "person" within the meaning of the Fourteenth Amendment.

The inability of the C. I. T. to recover upon Exhibit 1 arises from its failure to comply with a valid statutory regulation of the doing of business in Michigan. There is no deprivation of property without due process in enforcing this penalty.

The decision of the Michigan Supreme Court goes no further than numerous decisions of this court upholding the validity of state statutes imposing similar penalties upon foreign corporations which transact their business in such states without complying with the statutes relating to domestication.

See:

Munday, Trustee, et al. v. Wisconsin Trust Company et al., 252 U. S., 499, and

Interstate Amusement Company v. Albert, 239 U. S., 560.

Bothwell v. Buckbee, Mears Company, 72 U. S. (L. Ed.), 136.

FIFTH.

The Business in Which the Commercial Investment Trust Was Engaged in Michigan, Was Not Interstate Commerce.

The C. I. T.'s sole business in Michigan, as disclosed by the record, was to discount notes secured by chattel mortgages on automobiles sold in Michigan. Every act incidental to this business of purchasing and investing in such securities, the solicitation of automobile dealers, the investigation and approval of the credit standings of proposed purchasers of automobiles, the recording of chattel mortgages, the execution of discharges, the execution and recording of affidavits of renewal, the collection of accounts, and the repossession of cars, was done *in Michigan by resident agents of the C. I. T.*

There is no element of interstate commerce in any portion of this chain of activities, none of that "intercourse" among the states "for purposes of trade" which was said to be the essence of interstate commerce by Judge Washington in *Corfield v. Coryell, supra.* See, also, the oftquoted definition of interstate commerce in *Gibbons v. Ogden, 9 Wheat., 1, 189.*

Every phase of the C. I. T.'s business in this state, from beginning to end, could have been carried on just as

effectively if the state of Michigan were the only state in the Union. The notes and chattel mortgages of automobile purchasers, and the contracts of assignment and indorsement and guaranty of the automobile dealers, were all completely executed and accepted and became complete binding contracts in Michigan. The chattel mortgage liens on Michigan property were created and acquired and, together with the notes secured thereby, which were integral parts of the chattel mortgage forms, Exhibit 5 (104), were recorded in Michigan. No interstate agency was used in the purchase of these mortgages. It seems altogether clear that such business is not interstate commerce.

In *Nathan v. Louisiana*, 8 *How.*, 73, this court, on that theory, upheld the right of a state to tax the business of buying and selling bills of exchange in the state of Louisiana, even though the defendant in that case limited himself to dealing in foreign bills of exchange, and even though the bills sold by him were almost immediately sent out of the state by their purchasers. The court declared that while a bill of exchange might be an instrument of commerce, it was neither an export nor an import, but was merely an order for the payment of money, and the liability of the parties thereto depended upon certain acts to be done by the holder when it became payable; that therefore one engaged in buying and selling commercial paper is not engaged in commerce, but merely in supplying an *instrument of commerce*.

Plaintiff quotes Sanborn, J., in *Butler Bros. Shoe Company v. U. S. Rubber Company*, 156 *Fed.*, 1, as saying that "importation from one state into another was the indispensable element, the test of interstate commerce." * * * But there was no importation in the cause at

bar. Automobile mortgages were purchased by the C. I. T. in Michigan, filed for record with the Detroit City Clerk in the name of the C. I. T., Exhibit 17 (110-118, 33-34), Exhibits 38, 38-A, 41 (135, 136, 141). The instruments recorded included the notes, chattel mortgages, assignments to the C. I. T. and the guaranties by the dealers, Exhibit 5 (99-106). Before these documents ever left the state, they had become C. I. T. property and had been recorded. If they were later forwarded to New York, it was solely for the purpose of custody there.

The principle of the *Nathan case, supra,* was extended in *Paul v. Virginia, supra,* to contracts of insurance. We quote an especially pertinent portion of the opinion:

> "These contracts (of insurance) are not articles of commerce in any proper meaning of the word. *They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them.* They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states."
> * * *

The *Nathan case* was relied on, and extensively quoted.

The rule in *Paul v. Virginia* has very recently been reaffirmed in *Bothwell v. Buckbee, Mears Company, supra.*

The rule in the *Nathan case* that dealing in contracts which are mere *instruments of commerce* is not commerce, has not been departed from in the later decisions of this court.

Plaintiff cites the *Lottery case* as overruling this principle. The holding in this case was only that Congress, in its power to regulate, had the right to bar the physical transportation of lottery tickets by the use of interstate carriers. The reason for this exclusion was that statutes of the United States and the policy of the respective states had in effect declared the mischief of the lottery business. This case held that lottery tickets could be *completely excluded* from interstate commerce. It is a far cry to conclude that lottery tickets are established by this decision as *subjects* of commerce free from regulation by the states. We must distinguish the *Lottery case* which pertains to a federal statute of exclusion and the case at bar, which involves the right of a state to regulate the making of personal contracts within a state.

> *Hipolite Egg Company v. United States*, 220 U. S., 45, 57 s.
>
> *New York Life Ins. Company v. Deer Lodge County*, 231 U. S., 495, 510-511.
>
> *Brooks v. United States*, 267 U. S., 432, 437.

Citing the *Nathan case*, this court held, in *Hatch v. Reardon*, *supra*, that a transaction of sale of corporate stock in New York City, even though between residents of Connecticut, and even though the property of the corporations might be in other states and the corporations were foreign corporations, was not protected from a state stamp tax by the commerce clause, as "the bargain *did not contemplate or induce the transport of property from one state to another*." * * *

Even where contracts are so closely connected with interstate commerce as those solicited by an advertising agency, doing a national business, from advertisers in *different states* for advertising in publications having

a *nation-wide circulation*, the business of securing and selling such advertising contracts is not itself interstate commerce; such business is a mere incident of commercial intercourse.

> *Blumenstock Bros. v. Curtis Publishing Company, 252 U. S., 436.*

It was pointed out in this case that the use of the mails in connection with a business which itself is not interstate commerce does not, by some hidden alchemy, transform it into interstate commerce.

In line with these principles, the Michigan Supreme Court has, in the case of *Republic Acceptance Corporation v. Bennett, 220 Mich., 249*, relied on by that court in deciding the cause at bar, held that a business which was indistinguishable from that conducted by the C. I. T. in Michigan, was not interstate commerce, even though the mails were used in the transmission of drafts, letters and literature of various kinds between Pittsburgh, Pennsylvania, the home office of the corporation, and its agents and customers in Michigan.

The federal cases cited in pages 60-72 of plaintiff's brief clearly involve the *actual transportation* of tangible articles in interstate commerce and therefore do not modify the rule of the *Nathan case*. The state cases cited, moreover, do not even go to the extent of dealing with a federal question. They merely passed upon the question whether the foreign corporations involved, under the circumstances appearing in those cases, were "doing business" within the meaning of the various Foreign Corporation Acts of those states. No attempt was made to define interstate commerce or to discuss the problem whether the business shown to

be conducted by such corporations was interstate commerce.

The distinction is clearly pointed out in the leading case of *Baltic Mining Company v. Massachusetts, 231 U. S., 68*, where it is held that even if a foreign corporation *is* engaged in interstate commerce, if it also conducts a local and domestic business not so connected with its interstate commerce as to make the imposition of a tax thereon a direct burden upon interstate commerce, the state may impose a license tax upon such business in the application of its Foreign Corporation Act. Intrastate and interstate commerce are logically and in reality distinct, but are not mutually exclusive. The absence of the former does not therefore imply the presence of the latter.

The following are a few of the more recent cases which definitely support our proposition:

Oliver Company v. Lord, 262 U. S., 172.
U. S., 245.
Crescent Cotton Oil Company v. Mississippi, 257 U. S., 129.
Engel v. O'Malley, 219 U. S., 128.
Hopkins v. United States, 171 U. S., 578.

CONCLUSION.

For the reasons above stated, we submit that none of the constitutional objections advanced by plaintiff in error are valid, and the decision of the Michigan Supreme Court should therefore be affirmed, if the writ of error is not dismissed for lack of jurisdiction.

We desire to call this court's attention to the fact that the defenses of defendant based upon coverture and the failure of the C. I. T. to comply with the Michigan Assumed Name and Copartnership Certificate Statutes, were not passed upon by the Michigan Supreme Court, though properly presented by the record, and urged in defendant's brief and arguments before that court.

We therefore respectfully suggest, if this court deems it necessary to reverse the judgment below, that the cause be remanded for a disposition of defendant's remaining defenses.

Northern Pacific Railway Company v. Concannon, 239 U. S., 382.

Respectfully submitted,

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